

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

THOMAS JOHN SMITHSON,

Petitioner,

No. CIV S-01-1373 GEB DAD P

vs.

DERRAL ADAMS, Warden, et al.,

Respondents.

ORDER AND

FINDINGS AND RECOMMENDATIONS

\_\_\_\_\_/

Petitioner is a state prisoner proceeding by counsel with a petition for writ of habeas corpus. On April 21, 2006, this case came before the court for hearing of respondents' motion to dismiss three claims from petitioner's amended petition on the basis that the claims were filed beyond the one-year statute of limitations and do not relate back to the claims alleged in the original timely petition. Harry J. Colombo and Rachelle A. Newcomb appeared for respondents. Allen R. Bloom appeared for petitioner. The parties' arguments were heard, and all pending motions were taken under submission. For the reasons set forth below, the undersigned will recommend that respondents' motion to dismiss be granted.

BACKGROUND

Petitioner challenges a judgment of conviction rendered by the Sacramento County Superior Court on June 30, 1998, following his jury trial and conviction for first degree

1 murder, attempted robbery, and being a felon in possession of a firearm. The jury found true a  
2 special circumstance allegation that the murder was committed in furtherance of the robbery and  
3 an enhancement allegation that petitioner personally used a firearm in the commission of the  
4 offenses. Petitioner was sentenced to a term of imprisonment for life without the possibility of  
5 parole on the murder count and a concurrent determinate sentence of ten years on the other  
6 counts. (Am. Pet. at 1-2.)

7           Petitioner's judgment was affirmed by the California Court of Appeal for the  
8 Third Appellate District on March 29, 2000. On July 19, 2000, the California Supreme Court  
9 denied review. (Am. Pet. at 2-3.)

10           Petitioner's pro se federal habeas petition is dated July 11, 2001, and was received  
11 by the Clerk of the Court on July 17, 2001. On August 10, 2001, the undersigned directed  
12 respondents to file a response to the petition. Following the granting of two extensions of time,  
13 respondents filed their answer to the petition on November 8, 2001. Pursuant to one extension of  
14 time, petitioner filed his pro se traverse on February 21, 2002.

15           On March 4, 2002, petitioner filed a motion for appointment of counsel and an  
16 evidentiary hearing. Upon consideration of this motion and the new allegations in petitioner's  
17 traverse, the undersigned granted the motion for appointment of counsel subject to petitioner's  
18 demonstration of indigence. After petitioner filed an in forma pauperis application that made the  
19 required showing, the Federal Defender was appointed to represent petitioner on April 3, 2002.

20           On March 12, 2003, the undersigned granted petitioner's motion to stay this  
21 action after respondents filed a notice of non-opposition to the motion. On October 20, 2004, the  
22 undersigned granted petitioner's motion to lift the stay and file an amended petition after  
23 respondents filed a notice of non-opposition. A status conference was held on October 29, 2004,  
24 and a briefing scheduled was established. Respondents filed their answer to the amended  
25 petition on December 29, 2004. Following the granting of three extensions of time, petitioner  
26 filed a reply on April 13, 2005.

1 On July 1, 2005, the undersigned granted petitioner's motion for an evidentiary  
2 hearing on the first ground for relief in his amended petition. A date for the hearing was deferred  
3 in order to permit respondents to file a motion for discovery related to the first ground for relief.

4 On July 8, 2005, respondents filed a motion to amend their answer to petitioner's  
5 amended petition, accompanied by a proposed amended answer. The undersigned granted  
6 respondents' motion on August 15, 2005, after petitioner filed a statement of non-opposition.  
7 The amended answer was filed on August 15, 2005, and the undersigned granted petitioner's  
8 unopposed request to file a traverse to the amended answer. Following the granting of a series of  
9 extensions of time, petitioner filed a traverse to the amended answer on April 14, 2006.

10 On August 11, 2005, respondents filed their motion for discovery in preparation  
11 for the evidentiary hearing. Petitioner filed opposition to the motion on September 2, 2005, and  
12 respondents filed a reply on September 16, 2005.

13 On October 20, 2005, Allen Bloom substituted in as counsel for petitioner in place  
14 of the Office of the Federal Defender.

15 On March 20, 2006, respondents filed their motion to dismiss the claims alleged  
16 as the first, second, and third grounds for relief in petitioner's amended petition. Respondents  
17 also filed a motion for reconsideration of the order granting an evidentiary hearing on petitioner's  
18 first ground for relief. On April 14, 2006, petitioner filed untimely opposition to respondents'  
19 motions, together with a request to late-file the opposition. Respondents filed a reply on April  
20 20, 2006. The motions were heard on April 21, 2006. Rulings on respondents' motions for  
21 reconsideration and for discovery were deferred pending consideration of their motion to dismiss.

#### 22 RESPONDENTS' MOTION TO DISMISS

23 Respondents assert that the three new claims alleged in petitioner's October 1,  
24 2005 amended petition should be dismissed because they were filed beyond the one-year statute  
25 of limitations and do not relate back to any claim alleged in the pro se petition filed on July 17,  
26 2001.

1            Respondents argue that the Supreme Court's recent decision in Mayle v. Felix,  
2 545 U.S. 644 (2005), mandates dismissal of the three claims at issue and that dismissal of those  
3 claims will obviate the need for an evidentiary hearing.<sup>1</sup> Respondents concede that they filed a  
4 notice of non-opposition to petitioner's motion to stay and hold these proceedings in abeyance  
5 and that they filed a notice of non-opposition to petitioner's subsequent motion to lift the stay  
6 and file an amended petition. Respondents assert, however, that in each notice they preserved  
7 their objection to amendment of the original petition and, in their statement of non-opposition to  
8 petitioner's motion to lift the stay and file an amended petition, they specifically objected to the  
9 amendment to add new claims that did not relate back to the original claims. Respondents note  
10 that the court granted their unopposed motion to file an amended answer and that the amended  
11 answer asserts a statute-of-limitations bar as to the three new claims.

12            Respondents describe petitioner's first ground for relief as a claim that he was  
13 denied due process by the prosecutor's failure to disclose to him exculpatory information  
14 regarding co-defendant Spence's alleged admission that he killed the victim. Respondents  
15 contend that the original petition did not raise a Brady claim and did not allege any facts  
16 concerning the prosecutor's failure to disclose exculpatory information. Respondents assert that  
17 the original petition alleged only facts concerning (1) the prosecution's presentation of evidence  
18 that petitioner had been previously convicted of burglary, (2) defense counsel's failure to frame  
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20            <sup>1</sup> Respondents suggest that the court was not aware of the applicability of Mayle to this case  
21 on July 1, 2005, when petitioner's motion for an evidentiary hearing was granted. The undersigned  
22 was aware of the applicability of Mayle to this case and opened the hearing with a comment that the  
23 landscape had changed and might affect this case. When the attorney appearing for respondents'  
24 attorney of record was asked whether he wanted to go forward, counsel merely stated that  
25 respondents opposed petitioner's motion for evidentiary hearing and wanted to conduct discovery  
26 if the court was inclined to grant the motion. After the court's reasons for granting petitioner's  
motion were stated on the record, the undersigned indicated that, if there were no other matters to  
address, a briefing schedule would be set for respondents' discovery motion. Despite a second  
opportunity to propose the filing of an amended pleading or a motion to dismiss based on Mayle,  
respondents' counsel agreed to the scheduling of respondents' discovery motion and requested thirty  
to forty-five days to file the motion. It appeared to the undersigned that respondents' counsel was  
either unaware of the Mayle decision or unaware of its applicability to this case.

1 his motion for sanitization of the prior conviction as a severance motion, (3) the sufficiency of  
2 the evidence to support petitioner's attempted robbery and felony murder convictions, and (4) the  
3 sufficiency of the evidence to support the special circumstance finding that petitioner committed  
4 the murder in order to facilitate the robbery. Respondents contend that petitioner's Brady claim  
5 is based on facts that differ in time and type from the facts set forth in support of the original  
6 claims, does not relate back to any timely filed claim, and is time-barred.

7           Respondents describe petitioner's second ground for relief as a claim that the  
8 prosecutor committed various acts of misconduct in rebuttal argument concerning comments  
9 about opposing counsel and the court. Respondents contend that the original petition did not  
10 raise a claim of prosecutorial misconduct during rebuttal argument and did not allege any facts  
11 concerning prosecutorial misconduct in rebuttal argument. Respondents assert that the claim of  
12 prosecutorial misconduct during rebuttal argument is based on facts that differ in time and type  
13 from the facts set forth in support of the original claims, does not relate back to any timely filed  
14 claim, and is time-barred.

15           Respondents describe petitioner's third ground for relief as a claim that his  
16 appellate counsel was ineffective for failing to raise his other new claims on direct appeal or in a  
17 state habeas petition. Respondents contend that the original petition did not raise a claim of  
18 ineffective assistance of appellate counsel and did not allege any facts concerning ineffective  
19 assistance of appellate counsel. Respondents assert that the claim of ineffective assistance of  
20 appellate counsel is based on facts that differ in time and type from the facts set forth in support  
21 of the original claims, does not relate back, and is time-barred.

22           Respondents conclude that the statute of limitations expired on October 17, 2001,  
23 and that the three new claims alleged in petitioner's amended petition were filed after that date  
24 and do not relate back to the claims in the timely filed original petition. Respondents contend  
25 that petitioner has offered no facts that would entitle him to equitable tolling or give rise to a later  
26 start date for the running of the statute of limitations. For these reasons, respondents conclude

1 that the court should dismiss with prejudice as untimely the claims alleged as petitioner's first,  
2 second, and third grounds for relief.

3 PETITIONER'S OPPOSITION

4 Petitioner does not oppose respondents' motion to dismiss petitioner's third  
5 ground for relief but opposes dismissal of the first and second grounds for relief. Petitioner  
6 asserts that respondents are incorrect in their argument that the latter claims are time-barred.

7 Petitioner's first argument is that the decision in Mayle v. Felix does not apply to  
8 this case. Petitioner asserts that the Supreme Court in Mayle found that a claim based on  
9 Miranda could not be considered to relate back to an original petition that dealt with trial issues  
10 because the new Miranda claim dealt with an entirely pre-trial matter and involved facts at a  
11 different time and place than the trial and could have been fully resolved well before trial.

12 Petitioner argues that his first and second grounds for relief relate back to the core trial facts that  
13 were raised in his original petition. Petitioner explains that his new first ground for relief asserts  
14 a Brady violation – that the prosecutor did not provide the defendant with critical exonerating  
15 evidence that he could have used at trial – and that this claim involves trial witnesses and trial  
16 evidence and only becomes ripe at trial when it can be determined that certain evidence is  
17 exonerating in light of evidence offered against the defendant. Petitioner argues that his new  
18 second ground for relief asserts prosecutorial misconduct – the prosecutor disparaged defense  
19 counsel during closing argument – and that this claim involves an event at the trial, attacks the  
20 facts at the trial, is not an event that ripens before trial, and could only be resolved at the time of  
21 trial. Petitioner asserts that the claims alleged in his original first, third, and fourth grounds for  
22 relief – due process error arising from the district attorney's introduction of petitioner's prior  
23 conviction at trial, insufficient evidence offered at trial to support attempted robbery and robbery  
24 special circumstance, and insufficient evidence offered at trial to support the felony-murder  
25 charge and conviction – raised core trial facts that provide a basis for the claims alleged in his  
26 new first and second grounds for relief.

1 Applying the same rational, petitioner characterizes the claim in his original  
2 second ground for relief – inadequate assistance of counsel for failing to raise severance – as one  
3 that would usually be raised pre-trial and could be resolved before trial. Petitioner concludes that  
4 this claim concerning pre-trial issues does not provide a core of facts to which any of his new  
5 claims can relate back.

6 Petitioner argues next that Mayle is specifically inapplicable to his Brady claim  
7 because it is procedurally distinguishable in two regards: (1) unlike the petitioner in Mayle, he  
8 did not have counsel prior to the expiration of the AEDPA statute of limitations and (2) also  
9 unlike the petitioner in Mayle, he is entitled to equitable tolling because he was in administrative  
10 segregation for over a year and had no access to the law library for at least a year. Petitioner  
11 believes that one of the key reasons the Supreme Court rejected the Ninth Circuit's relating back  
12 decision was that Felix still had time to add a new claim after counsel was appointed to represent  
13 him. He points out that he was proceeding pro se, did not have access to the law library and did  
14 not have counsel until the statute of limitations had expired.

15 With regard to equitable tolling, petitioner asserts that he is entitled to four and a  
16 half months of such tolling because he was denied access to the law library for at least that  
17 amount of time, which would extend the statute of limitations from October 17, 2001, to a date  
18 after February 21, 2002, when he raised the Brady claim in his pro se traverse and provided three  
19 declarations in support of the claim.

20 Attached to petitioner's traverse is an unsigned declaration concerning petitioner's  
21 placement in administrative segregation at Salinas Valley State Prison on August 14, 2000, the  
22 alleged denial of access to the prison law library until he filed an inmate appeal on December 11,  
23 2000, and his ability to use the law library after the appeal was granted. The declaration  
24 concludes with an unsigned statement that this information was provided to counsel over the  
25 telephone, that the declaration had been mailed to plaintiff for signature, and that the signed  
26 declaration would be sent to the court upon receipt. No signed declaration has been filed.

1 A document filed by petitioner's counsel on April 19, 2006, was docketed as a  
2 supplement to the traverse. The document appears to be a copy of an inmate appeal submitted by  
3 petitioner on December 18, 2000, concerning library access. The appeal appears to have been  
4 granted at the informal level on March 28, 2001, after an interview with petitioner on March 15,  
5 2001. The appeal response suggests that petitioner was not denied access to the law library but  
6 merely failed to follow proper procedures for prisoners in administrative segregation in seeking  
7 access to legal materials .

#### 8 RESPONDENTS' REPLY

9 Respondents argue that petitioner's arguments are without merit and the claims  
10 alleged in petitioner's first, second, and third grounds for relief should be dismissed.

11 Respondents assert that petitioner's position regarding Mayle v. Felix  
12 misunderstands the Supreme Court's holding that an amended petition does not relate back when  
13 it asserts a new ground for relief supported by facts that differ in both time and type from those  
14 the original pleading set forth, while relation back is in order if the original and amended  
15 petitions present claims that are tied to a common core of operative facts. Respondents point out  
16 that the Supreme Court's opinion in Mayle does not use the phrase "core trial facts" and that the  
17 Court rejected the Ninth Circuit's approach, which defined "conduct, transaction, or occurrence"  
18 too broadly to mean the same trial, conviction or sentence. Respondents conclude that  
19 petitioner's interpretation applies the same approach that was rejected by the Supreme Court  
20 except that his position is that new claims relating to the same part of the proceedings at issue in  
21 the original petition, such as pretrial, trial, or appeal, relate back. Respondents quote language  
22 from Mayle about each separate congeries of facts constituting an occurrence. Respondents  
23 reiterate that petitioner's new claims and old claims are not tied to a common core of operative  
24 facts.

25 Respondents also challenge petitioner's attempt to distinguish the holding in  
26 Mayle on the ground that the decision applies only to cases where the petitioner has counsel prior



1 to the expiration of the AEDPA statute of limitations. Respondents argue that petitioner  
2 misunderstands Mayle and relies on the dissent and on dicta in a footnote in the majority opinion  
3 recognizing a concern raised by the dissent regarding indigent defendants. Respondents observe  
4 that the concern raised by the dissent demonstrates the dissenters' understanding that the majority  
5 opinion did not limit their decision to cases in which the petitioners had counsel prior to  
6 expiration of the statute of limitations. Respondents also point out that, in this case, petitioner  
7 himself raised his new claims in the traverse he filed prior to appointment of counsel.

8           Respondents argue that petitioner is not entitled to equitable tolling based on  
9 alleged denial of law library access because (1) petitioner's conclusory allegation fails to provide  
10 facts necessary to prove the claim, is supported only by an unsigned declaration, has not shown  
11 that he was denied all access to the law library, and filed an inmate appeal concerning law library  
12 access that was granted in March 2001, months before the statute of limitations expired; (2)  
13 petitioner has not demonstrated the diligence required to warrant equitable tolling, given that he  
14 was aware of the Brady claim in 1998 yet did not present it to the state courts until 2003; (3)  
15 petitioner has not shown that denial of access to the law library was the cause of his untimeliness  
16 in filing his Brady claim; (4) petitioner was aware of the factual basis for his Brady claim long  
17 before the AEDPA statute of limitations began to run and could have presented the claim without  
18 access to the law library; and (5) even if petitioner was denied access to the law library, his claim  
19 is still untimely.

20           Respondents' reply was supported by the declaration of Araceli Esparza, a staff  
21 services analyst at Salinas Valley State Prison, where petitioner was confined during the time he  
22 allegedly lacked law library access. Declarant states that inmates in administrative access are not  
23 denied all access to the law library. Declarant explains that physical access may be denied, but  
24 inmates have access to the library through a paging system that allows the inmates to request that  
25 the librarian obtain and send them certain information.

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For these reasons, respondents assert that their motion to dismiss the new claims with prejudice should be granted.

### ANALYSIS

#### I. The AEDPA Statute of Limitations

On April 24, 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") was enacted. The AEDPA amended 28 U.S.C. § 2244 by adding the following provision:

(d) (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d). The one-year AEDPA statute of limitations applies to all federal habeas corpus petitions filed after the statute was enacted and therefore applies to the present case, filed in 2001. See Lindh v. Murphy, 521 U.S. 320, 322-23 (1997).

#### II. Application of § 2244(d)(1)(A)

For purposes of 28 U.S.C. § 2244(d)(1)(A), the judgment entered against petitioner on June 30, 1998, became final on October 17, 2000, ninety days after the California

1 Supreme Court denied review on July 19, 2000. See Bowen v. Roe, 188 F.3d 1157, 1158-59 (9th  
2 Cir. 1999). Petitioner did not file any state petitions for collateral relief in the year following  
3 October 17, 2000. Thus, the one-year period of limitation ran without interruption from October  
4 18, 2000, until it expired on October 17, 2001. Prior to October 17, 2001, petitioner's federal  
5 habeas petition dated July 11, 2001, was received by the court for filing on July 17, 2001.

6 Petitioner's amended petition was filed on October 1, 2004, almost three years  
7 after the statute of limitations expired. All new claims alleged in the amended petition are barred  
8 by the AEDPA statute of limitations unless some other statutory provision applies, equitable  
9 tolling is warranted, or the new claims relate back to the original claims. Petitioner has not  
10 argued that any provision of § 2244(d) other than § 2244(d)(1)(A) is applicable, and the court  
11 finds that no other provision applies.

### 12 III. Equitable Tolling

13 The one-year period of limitation contained in 28 U.S.C. § 2244(d) is a statute of  
14 limitations subject to tolling. Calderon v. United States Dist. Court (Beeler), 128 F.3d 1283,  
15 1288 (9th Cir. 1997), overruled in part on other grounds by Calderon v. United States Dist. Court  
16 (Kelly), 163 F.3d 530 (9th Cir. 1998). "Equitable tolling will not be available in most cases, as  
17 extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's  
18 control make it impossible to file a petition on time." Calderon, 128 F.3d at 1288-89. Courts are  
19 expected to "take seriously Congress's desire to accelerate the federal habeas process." Id. at  
20 1289. See also Corjasso v. Ayers, 278 F.3d 874, 877 (9th Cir. 2002) (describing the Ninth  
21 Circuit's standard as setting a "high hurdle" to the application of equitable tolling).

22 Even where extraordinary circumstances are shown, equitable tolling will not be  
23 available unless the petitioner diligently pursued his claims. 128 F.3d at 1289. Equitable tolling  
24 is appropriate only when external forces, rather than a petitioner's lack of diligence, account for  
25 the petitioner's failure to file a timely habeas petition. Miles v. Prunty, 187 F.3d 1104, 1107 (9th  
26 Cir. 1999). The petitioner bears the burden of demonstrating grounds for equitable tolling.

1 Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005); Miranda v. Castro, 292  
2 F.3d 1063, 1065 (9th Cir. 2002).

3           The Ninth Circuit Court of Appeals has addressed the issue of equitable tolling in  
4 habeas proceedings many times. For the most part, and most often in unpublished decisions, the  
5 court has affirmed district court decisions denying equitable tolling. Typical decisions affirming  
6 the denial of equitable tolling include Miranda, 292 F.3d at 1067-68, in which the court affirmed  
7 the district court's denial of equitable tolling where the pro se petitioner filed his petition  
8 untimely on the basis of erroneous information provided by the attorney appointed to represent  
9 him on direct appeal, and Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001), in which the  
10 court affirmed the district court's denial of equitable tolling where the petitioner's attorney  
11 miscalculated the limitations period. See also Brambles v. Duncan, 412 F.3d 1066, 1070-71 (9th  
12 Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 126 S. Ct. 485 (2005) (affirming the district court's denial of  
13 equitable tolling where the petitioner filed an untimely petition after previously filing a timely  
14 mixed petition and choosing to dismiss the entire petition and return to state court to exhaust  
15 additional claim); Raspberry v. Garcia, 448 F.3d 1150, 1153-54 (9th Cir. 2006) (affirming denial  
16 of equitable tolling because district court's failure to advise petitioner of right to amend petition  
17 to include unexhausted claims and petitioner's inability to correctly calculate limitations period  
18 were not extraordinary circumstances warranting equitable tolling).

19           Due to the highly fact-dependent nature of the grounds for equitable tolling,  
20 factual development may be required for an issue such as the petitioner's mental illness, the  
21 petitioner's access to his legal materials, or the adequacy of a particular prison law library at a  
22 specific time. See, e.g., Mendoza v. Carey, 449 F.3d 1065, 1069-71 (9th Cir. 2006) (remanding  
23 for appropriate development of the record on the issue of whether petitioner's inability to obtain  
24 Spanish-language materials or procure translation assistance was an extraordinary circumstance  
25 preventing him from filing a timely habeas petition); Laws v. Lamarque, 351 F.3d 919, 922-24  
26 (9th Cir. 2003) (remanding for development of the record on the issue of whether petitioner's

1 mental illness prevented him from timely filing his habeas petition); Lott v. Mueller, 304 F.3d  
2 918, 923 (9th Cir. 2002) (remanding for development of the record related to availability of  
3 equitable tolling where petition was filed, at most, twenty days late, and pro se petitioner alleged  
4 he was denied access to his legal files for eighty-two days during the one-year period of  
5 limitation due to two temporary transfers for court proceedings); Whalem/Hunt v. Early, 233  
6 F.3d 1146, 1148 (9th Cir. 2000) (en banc) (remanding for factual development related to  
7 availability of equitable tolling or existence of a state-caused impediment where the petitioner  
8 alleged that the prison law library contained no legal materials describing AEDPA and the one-  
9 year limitations period until June 1998).

10           The Ninth Circuit has affirmed or mandated equitable tolling in a few cases where  
11 a diligent petitioner was unable to file a timely petition due to a significant delay caused by an  
12 external force such as the district court, prison officials, or, but rarely, the petitioner's own  
13 habeas counsel. See Espinoza-Matthews, 432 F.3d 1021 (applying equitable tolling for period of  
14 almost eleven months during which pro se petitioner was housed in administrative segregation  
15 and was denied access to his legal materials throughout that time despite diligent efforts to obtain  
16 access); Spitsyn v. Moore, 345 F.3d 796 (9th Cir. 2003) (finding misconduct of petitioner's  
17 attorney sufficiently egregious to justify equitable tolling where attorney was hired nearly a full  
18 year in advance of the deadline for filing a federal petition but did not prepare and file the  
19 petition despite the fact that petitioner and his mother contacted the attorney numerous times  
20 seeking action and where, despite a request for return of the file, the attorney retained the file for  
21 the duration of the limitations period and two months beyond); Smith v. Ratelle, 323 F.3d 813  
22 (9th Cir. 2003) (applying equitable tolling where district court previously dismissed pro se  
23 petitioner's timely habeas petition without providing an opportunity to amend as an alternative to  
24 dismissal); Stillman v. LaMarque, 319 F.3d 1199 (9th Cir. 2003) (applying equitable tolling  
25 where prison litigation coordinator promised petitioner's attorney he would obtain prisoner's  
26 signature in time to file petition but broke the promise and caused petition to be late); Corjasso,

1 278 F.3d 874 (applying equitable tolling where district court's initial dismissal of timely petition  
2 was improper and court's lengthy delay in ruling that the amended petition was unexhausted  
3 consumed 258 days of pro se petitioner's one-year period of limitation and caused petitioner to  
4 lose time that would otherwise have been available for exhausting state court remedies); Miles,  
5 187 F.3d 1104 (applying equitable tolling where prison officials delayed pro se petitioner's  
6 request that check be drawn on his prison trust account for payment of filing fee); Calderon  
7 (Kelly), 163 F.3d 530 (applying equitable tolling in a death penalty case because of earlier court-  
8 ordered stay of the habeas proceedings, petitioner's alleged mental incompetency, and court's  
9 mistaken dismissal of timely habeas proceedings); Calderon (Beeler), 128 F.3d 1283 (holding in  
10 a death penalty case that withdrawal of court-appointed habeas counsel, who moved out of state  
11 and whose work product was not usable by replacement counsel, qualified as an extraordinary  
12 circumstance beyond petitioner's control that justified tolling the statute of limitations).

13           Although the Supreme Court has recently "framed the equitable tolling standard in  
14 less absolute terms" than the Ninth Circuit's well established test of "impossible to file a petition  
15 on time," the Ninth Circuit has not yet decided whether the Supreme Court's formulation "has  
16 lowered the bar somewhat." Espinoza-Matthews, 432 F.3d at 1026 n.5 (citing Pace v.  
17 DiGuglielmo, 544 U.S. 408, 418 (2005)). In Pace, the Supreme Court noted that it has "never  
18 squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of  
19 limitations." 544 U.S. at 418 n.8. The Court found it unnecessary to reach the question in Pace  
20 because the petitioner's failure to establish diligence in that case would preclude the application  
21 of equitable tolling to his untimely petition. Id. at 418-19. The Court observed, however, that  
22 "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements:  
23 (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance  
24 stood in his way." 544 U.S. at 418 (citing Irwin v. Department of Veterans Affairs, 498 U.S. 89,  
25 96 (1990)).

26 ////

1 In the present case, petitioner has failed to demonstrate entitlement to equitable  
2 tolling. Although petitioner's counsel has failed to file a signed declaration by petitioner, the  
3 declaration attached to petitioner's traverse, even if signed, would not support a conclusion that  
4 petitioner's placement in administrative segregation resulted in a denial of law library access that  
5 rendered it impossible for petitioner to file a federal habeas petition on time.

6 Petitioner signed a timely federal habeas petition on July 11, 2001, and the  
7 pleading was received for filing on July 17, 2001. Clearly, lack of law library access did not  
8 constitute an extraordinary circumstance beyond petitioner's control that made it impossible for  
9 him to file a federal habeas petition on time, because he did file a timely federal habeas petition.  
10 There is no evidence that the alleged lack of law library access prevented petitioner from filing a  
11 state habeas petition prior to October 17, 2001. Petitioner was aware of the facts that supported  
12 his Brady claim in 1998 and was aware of his appellate counsel's failure to raise the Brady claim  
13 on direct appeal in 2000. Petitioner has not argued or shown that the facts concerning alleged  
14 prosecutorial misconduct during rebuttal argument were not evident to petitioner during trial or at  
15 some subsequent time prior to October 17, 2001.

16 In addition, the inmate appeal filed as a supplement to petitioner's traverse on  
17 April 19, 2006 demonstrates that the alleged denial of access to the law library occurred between  
18 August 13, 2000 and March 15, 2001, at the latest, and that on March 15, 2001 petitioner was  
19 interviewed and informed of the procedure for obtaining legal materials while in administrative  
20 segregation. Thus, any denial of law library access was early in the one-year period of limitation,  
21 did not prevent petitioner from filing a timely federal habeas petition, and would not have  
22 prevented him from filing a state habeas petition alleging unexhausted claims before the statute  
23 of limitations expired.

24 Petitioner has failed to meet his burden of demonstrating entitlement to equitable  
25 tolling on any ground for any period of time.

26 /////

1 IV. Relation Back of New Claims

2 An application for a writ of habeas corpus “may be amended or supplemented as  
3 provided in the rules of civil procedure applicable to civil actions.” 28 U.S.C. § 2242. See also  
4 Rule 11, Fed. R. Governing § 2254 Cases (providing that the Federal Rules of Civil Procedure  
5 may be applied in habeas corpus proceedings to the extent that the rules of civil procedure are not  
6 inconsistent with any statutory provision or with the rules governing habeas cases); Fed. R. Civ.  
7 P. 81(a)(2) (providing that the Federal Rules of Civil Procedure are applicable to proceedings for  
8 habeas corpus “to the extent that the practice in such proceedings is not set forth in statutes of the  
9 United States, the Rules Governing Section 2254 Cases, or the Rules Governing Section 2255  
10 Proceedings”).

11 Under Federal Rule of Civil Procedure 15(a), a habeas petitioner may amend his  
12 pleadings once as a matter of course before a responsive pleading is served and may seek leave of  
13 court to amend his pleading at any time during the proceeding. Mayle v. Felix, 545 U.S. 644,  
14 \_\_\_, 125 S. Ct. 2562, 2569 (2005). Under Rule 15(c), a petitioner’s amendments made after the  
15 statute of limitations has run will relate back to the date of his original pleading if the new claims  
16 arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the  
17 original pleading. Id. (citing Fed. R. Civ. P. 15(c)(2)).

18 In Mayle v. Felix, the Supreme Court explained that “[t]he ‘original pleading’ to  
19 which Rule 15 refers is the complaint in an ordinary civil case, and the petition in a habeas  
20 proceeding.” Id. at 2569-70. The Court observed that the complaint in an ordinary civil case  
21 need only provide fair notice of the plaintiff’s claim and the grounds on which the claim rests,  
22 while a habeas petition, on the other hand, is required to specify all grounds for relief available to  
23 the petitioner and state the facts supporting each ground. Id. at 2570. Because of this difference  
24 between civil complaints and habeas petitions, the relation back of new habeas claims “depends  
25 on the existence of a common ‘core of operative facts’ uniting the original and newly asserted  
26

/////



claims.” Id. at 2572.<sup>2</sup> The common core of operative facts must not be viewed at too high a level of generality, and an “occurrence” will consist of each separate set of facts that supports a ground for relief. Id. at 2573. See also United States v. Ciampi, 419 F.3d 20, 24 (1st Cir. 2005) (“[A] petitioner does not satisfy the Rule 15 “relation back” standard merely by raising some type of ineffective assistance in the original petition, and then amending the petition to assert another ineffective assistance claim based upon an entirely distinct type of attorney misfeasance.”), cert. denied \_\_\_ U.S. \_\_\_, 126 S. Ct. 2906 (2006). Applying these principles in Mayle, the Court ruled that the new claim did not relate back to the original claim because the new claim arose from the petitioner’s own pretrial interrogation and was different in time and place from his original claim, which arose from the pretrial police interrogation of a witness. 125 S. Ct. at 2572-73.

Here, petitioner’s original petition raised the following claims:

Ground 1: Petitioner was denied due process of law as guaranteed by the United States Constitution when the court allowed the People to introduce evidence that petitioner had been convicted previously of burglary.

Ground 2: Petitioner was denied effective assistance of trial counsel as guaranteed by the Fifth and Fourteenth Amendments when counsel moved to sanitize the reading of the information and preclude mention of petitioner’s prior burglary but failed to move to sever the charge of being an ex-felon in possession of a firearm.

Ground 3: Petitioner was denied due process of law because the evidence was insufficient to support the attempted robbery conviction and the robbery special circumstances finding

Ground 4: Petitioner was denied due process of law because the evidence was insufficient to support the felony murder charge and conviction.

(Pet. at pages numbered (5) and (6).)

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<sup>2</sup> See Jackson v. Roe, 425 F.3d 654, 660 n. 8 (9th Cir. 2005) (stating that the Supreme Court held in Mayle v. Felix that an amended claim in a habeas petition relates back for statute of limitations purposes only if it shares a common core of operative facts with the original claim).

1 In his amended petition, petitioner alleges the original four claims as his fourth,  
2 fifth, sixth, and seventh grounds for relief. His new claims, presented as the first three grounds  
3 for relief, are stated as follows:

4 Ground 1: Petitioner was denied his due process rights when the  
5 prosecution failed to disclose exculpatory information regarding a  
6 witness's statement that petitioner's co-defendant admitted killing  
7 the victim.

8 Ground 2: Prosecutorial misconduct denied petitioner due process  
9 when the prosecutor's closing argument attacked the defense  
10 attorney's integrity and claimed the prosecutor's argument was  
11 endorsed by the trial judge.

12 Ground 3: Ineffective assistance of appellate counsel in relation to  
13 this case in violation of the Sixth and Fourteenth Amendments and  
14 the California Constitution occurred when counsel failed to raise  
15 the claims alleged in the first and second grounds for relief.

16 (Am. Pet. at 4, 11, 14, and 16.)

17 After careful consideration of petitioner's original and amended petitions, as well  
18 as the parties' arguments, the undersigned finds that the newly exhausted claims alleged in  
19 Grounds 1, 2, and 3 of the amended petition do not share a common core of operative facts with  
20 any of petitioner's original claims and therefore do not relate back to the original petition. In  
21 particular, petitioner's arguments concerning the limited scope of the holding in Mayle v. Felix  
22 are unsupported and unpersuasive.

#### 23 CONCLUSION

24 Petitioner's amended petition was filed almost three years after the statute of  
25 limitations expired. The three new claims alleged in the pleading are barred by the AEDPA  
26 statute of limitations and do not relate back to the claims alleged in the original timely petition.  
27 Petitioner has failed to demonstrate HIS entitlement to equitable tolling. For these reasons, the  
28 undersigned will recommend that respondents' motion to dismiss be granted.

29 In light of the recommendation that respondents' motion to dismiss be granted,  
30 the undersigned will grant respondents' motion for reconsideration of this court's order granting

petitioner's motion for an evidentiary hearing. The order granting an evidentiary hearing will be vacated, and petitioner's motion for evidentiary hearing will be denied. Respondents' motion for discovery will be denied as moot.

Accordingly, IT IS ORDERED that:

1. Petitioner's April 14, 2006 request to late-file opposition to respondents' motions (#91) is granted;

2. Respondents' March 20, 2006 motion for reconsideration (#90) is granted;

3. This court's July 5, 2005 order (#71) granting petitioner's motion for an evidentiary hearing is vacated;

4. Petitioner's May 18, 2005 motion for evidentiary hearing (#62) is denied;

IT IS RECOMMENDED that:

1. Respondents' March 20, 2006 motion to dismiss (#90) be granted; and

2. The claims alleged as Grounds 1, 2, and 3 in petitioner's amended petition be dismissed and this action proceed on the claims alleged as Grounds 4, 5, 6, and 7.

These findings and recommendations will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within **ten** days after these findings and recommendations are served, any party may file and serve written objections with the court. A document containing objections should be titled "Objections to Magistrate Judge's Findings and Recommendations." Any reply to objections shall be filed and served within **ten** days after service of the objections. The parties are advised that failure to file objections within the specified time may, under certain circumstances, waive the right to appeal the District Court's order. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: January 30, 2007.

DAD:13  
smit1373.mtd

  
DALE A. DROZD  
UNITED STATES MAGISTRATE JUDGE